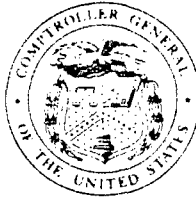


DECISION



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**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

[Protest of Air Force Contract Award]

FILE: B-200139

DATE: January 27, 1981

MATTER OF: Thomson-CSF Components,
Dumont Division

DIGEST:

1. Protest filed with GAO more than 10 days after closing date for receipt of initial proposals against alleged apparent solicitation improprieties is untimely under 4 C.F.R. § 20.2(b)(1).
2. Record does not show protester's conversation prior to closing date with representative of agency was intended to be oral protest. In any event, if conversation was oral protest, agency's receipt of proposals without modifying RFP was initial adverse agency action and protest more than 10 days after such action is untimely.
3. GAO will not disturb agency decision whether to waive first article testing unless agency decision is clearly arbitrary and capricious. Solicitation specified that waiver would be permitted only where offeror had previously supplied item that was identical to solicitation item. Record shows item offered by protester was not identical to items previously supplied to Government by protester.
4. GAO finds no objection to award to other than lowest priced offeror since lowest priced offeror proposed delivery schedule longer than RFP delivery schedule and RFP gave agency right to award to other than lowest priced offeror providing such award resulted in acceptable delivery schedule.

The Dumont Division of the Thomson-CSF Components (Dumont) protests the award of a contract to the Watkins-Johnson Company under request for proposal (RFP) No. F34601-80-R-3390 issued by the Department

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of the Air Force. The solicitation, which was limited to approved sources, was for tube circuit assemblies to be used in certain military aircraft.

Dumont contends that the delivery schedule in the RFP was prejudicial to offerors who had to undergo first article testing because the initial delivery dates for some of the production tubes were the same as the date set forth in the RFP for the submission of units for first article testing. According to Dumont, this created a situation of impossible performance, especially since the contracting officer had 70 days under the terms of the RFP to give notice of first article approved.

Dumont also objects to the contracting officer's refusal to waive the first article testing requirement for the company. Dumont alleges that prior to the submission of its proposal, it had submitted adequate documentation demonstrating the fact that as a subcontractor it had for many years successfully supplied an identical tube to another company. Consequently, Dumont believes that it should have qualified for the waiver of first article testing permitted by the terms of the RFP.

As a final point, Dumont objects to the award of the contract to Watkins-Johnson at a higher price than Dumont offered.

Timeliness

The Air Force asserts that Dumont's allegations concerning the delivery dates for the first article test units and the first production units are untimely because the dates complained of were readily apparent from the face of the RFP and Dumont's protest was filed with this Office after the closing date for receipt of proposals.

We agree. Paragraph F-01A of the RFP set forth clearly the required delivery dates and the production units to be delivered on those dates. Paragraph H-24 provided that first article units would be delivered within 60 days after the receipt of award or a fully executed contract. Subparagraph F-01AC provided a basis for comparison of production unit delivery dates

to the date for first article submission by stating in part that the delivery requirements were based on the assumption that an award would be made by September 30, 1980. Under our Bid Protest Procedures, 4 C.F.R. part 20 (1980), protests based upon alleged solicitation improprieties that are apparent prior to the closing date for receipt of proposals shall be filed prior to that date. See 4 C.F.R. § 20.2(b)(1) (1980). Here, the closing date for receipt of proposals was July 23, 1980, and an award was made on August 19, 1980. Dumont's protest was not filed until August 27, 1980.

Dumont alleges that prior to the submission of its bid the matter of delivery dates was discussed over the telephone with a representative of the Air Force's Oklahoma City procurement office. Also, Dumont points out that subsequent to the proposal closing date but prior to award, the contracting officer requested the company to clarify its proposal relative to delivery dates. In response, Dumont sent a mailgram on July 29, 1980, stating that the delivery schedule which required first article testing was impossible to achieve unless shipment of production units was permitted prior to first article approval.

If Dumont intended the telephone conversation with the Oklahoma City Air Force representative to be a protest, we believe the Air Force's receipt of proposals without modifying the RFP was initial adverse agency action, and Dumont's protest here--more than 10 days after that receipt--is untimely filed. See General Leasing Corporation--Reconsideration, B-193527, March 19, 1979, 79-1 CPD 170, and the cases cited therein. In any event, we do not think that Dumont intended a protest in view of the company's statement in the record that its objection to the delivery schedule was not pursued in writing because Dumont felt it had presented adequate documentation to qualify for waiver of first article testing.

As to Dumont's July 29, 1980, mailgram, this was submitted to the contracting officer after the closing date for receipt of proposals. Under our Bid Protest Procedures, we will consider a protest filed within 10 days of initial adverse agency protest action so long as the agency protest was itself timely filed in

accordance with our timeliness requirements. See 4 C.F.R. § 20.2(a) (1980). Thus, if Dumont's July 29, 1980, mailgram did constitute a protest to the Air Force it was untimely because it was based upon apparent solicitation improprieties and, therefore, should have been filed with the Air Force prior to the closing date for receipt of proposals. See 4 C.F.R. § 20.2(b)(1).

Waiver of First Article Testing

The Air Force states that prior to the protested procurement Dumont had produced a tube identified as tube KC2778 and supplied it indirectly to that agency as a subcontractor on another Air Force contract. The Air Force further states that here Dumont was offering a tube identified as tube 342A. According to the Air Force, tube 342A differs from tube KC2778 in several respects. Tube 342A has a modified high voltage lead and there are certain dimensional differences between the two tubes. Because Dumont had never provided tube 342A under a Government contract, the Air Force informed Dumont on October 22, 1979, that first article would be required for that particular tube before it would be accepted under any Air Force contract.

The decision whether to waive first article testing for a particular offeror is essentially an administrative one which we will not disturb unless it is clearly arbitrary and capricious. Libby Welding Company, B-186395, February 25, 1977, 77-1 CPD 139. We believe that the record supports the Air Force's determination not to grant a waiver to Dumont. Subparagraph M-10a states in part:

"Where supplies identical to those called for have been previously furnished by the offeror and have been accepted by the Government, the requirement for First Article approval may be waived * * *"
(Emphasis added.)

While admitting the Air Force's statement concerning the modified high voltage lead, Dumont denies that the tube it was offering had any dimensional differences from the tubes it had previously supplied to the Government. However, the company has offered no proof in

support of this denial. With regard to the modified high voltage lead, we cannot accept Dumont's contention that this difference is not a difference in the actual tube itself but merely the addition of a high voltage lead. We do not think that in technical terms such an arbitrary distinction can be made. Consequently, we cannot disagree with the Air Force's conclusion that tube 342A was not identical to tube KC2778 previously supplied by Dumont.

Award at Higher Price

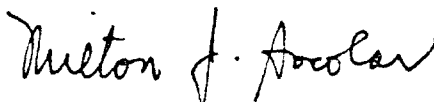
Dumont objects to the fact that the Air Force awarded a contract to the Watkins-Johnson Company at a price \$30 per unit higher than the price offered by Dumont. Subparagraph F-01b of the RFP provided:

"If the offeror is unable to meet the Required Delivery Schedule, he may set forth below the delivery schedule he is prepared to meet. However, should the offeror's proposed delivery schedule not meet the Required Delivery Schedule, and should the Government determine such proposed delivery schedule to be unacceptable, the Government reserves the right to make an award to an offeror submitting other than the lowest offer as to price, if such action will provide an acceptable delivery schedule and is determined to be in the best interests of the Government. If the offeror does not propose a different delivery schedule below, the Government's Required Delivery Schedule shall apply."

The record shows that early delivery of the tubes was of the essence since these tubes were urgently needed for use in the repair of a certain aircraft part. Further, the RFP did specify required delivery dates and the above-cited clause placed the prospective offeror on notice that if he submitted his own proposed delivery schedule, his offer would be evaluated against offers containing delivery schedules conforming to the RFP's required delivery schedule. Consequently, we believe that Dumont was aware of the risk involved in offering other than the required delivery schedule.

The record reveals that Dumont proposed a delivery schedule under its offer for first article testing that was longer than the RFP's required delivery schedule. Watkins-Johnson proposed to follow the RFP's required delivery schedule. Therefore, we find no basis for any objection to the award to Watkins-Johnson at a higher price. Rather, we believe such an award to be the most advantageous to the Government given the exigency of the delivery requirements.

The protest is dismissed in part and denied in part.

A handwritten signature in cursive script, reading "Milton J. Fowler".

For the Comptroller General
of the United States